

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

THOMAS SLOANE, individually and on
behalf of persons similarly situated,

Plaintiff,

Civil Action

vs.

No. 15-1208

GULF INTERSTATE FIELD SERVICES, INC.,

Defendant.

Transcript of TELEPHONIC DISCOVERY STATUS CONFERENCE
proceedings recorded on Monday, April 4, 2016, in the United
States District Court, Pittsburgh, Pennsylvania, before
The Hon. Nora Barry Fischer, United States District Judge

APPEARANCES:

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produced by computer-aided transcription

P R O C E E D I N G S

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(3:30 p.m.; teleconference proceedings:)

THE COURT: Hello. This is Judge Fischer, and this is the time and place for a discovery status conference in Sloane versus Gulf Interstate Field Services, Inc., at Civil Action No. 15-1208.

I'm presuming we have Sarah Schalman-Bergen and also Ms. Idalski on the telephone. We have a court reporter present. Nathan Catanese, as you know, is the law clerk assigned, and he has dialed up this call.

I have read your joint report regarding status conference. I've also been provided with the Plaintiff's amended second set of requests for production of documents addressed to Defendant, Gulf Interstate Field Services, Inc.

I also received the prior Plaintiff's second set of requests for production of documents addressed to Defendant, Gulf Interstate Field Services, Inc.

Also at my request I received a rough draft transcript of the Robert Sprick, S-p-r-i-c-k, deposition dated March 25, Volume 1, and at my request the amended notice of videotaped deposition of Defendant, Gulf Interstate Field Services, Inc's., corporate designee pursuant to Federal Rule of Civil Procedure 30(b)(6).

Furthermore, my clerk, Mr. Catanese, reached out to

1 counsel to see whether or not since they provided these
2 documents they've been able to make any further agreements.
3 I've been told that is not the case.

4 I'll also tell you at the outset the Court will
5 adjourn this call no later than 4:15 today because I have to
6 be at Pitt Law School at 4:45.

7 Now, with that, who wants to lead off the
8 discussion? And recall, since we're on the telephone, you
9 need to identify yourself for our court reporter before you
10 speak.

11 MS. SCHALMAN-BERGEN: Your Honor, this is Sarah
12 Schalman-Bergen for the Plaintiff. I believe that there are
13 two related sets of disputes that we've identified in the
14 joint report for the status conference.

15 The first involves Plaintiff's second set of
16 requests for production in which there are I believe nine
17 requests for which Defendant has said that these requests are
18 not related to precertification issues and Plaintiff contend
19 are related to Rule 23 class certification and necessary for
20 that purpose.

21 And the second issue for the Court is that
22 Plaintiffs wanted to discuss the procedure for handling
23 objections to depositions on the grounds that the questions
24 are not related to certification.

25 At the deposition of Robert Sprick, defense counsel

1 instructed the witness not to answer a number of lines of
2 questioning on the grounds that the questions were not
3 related to class certification.

4 Plaintiff's contend that those questions are
5 related to class certification, and so we have both process
6 and substantive concerns, the substantive concerns primarily
7 being that we will not be able to obtain the discovery that
8 we think is needed for Rule 23 certification, and that
9 defense counsel will be able to bring up some issues that --
10 in response to our Rule 23 motion that we haven't had the
11 opportunity to get discovery on.

12 The process concerns, which I'm happy to address
13 any specific questions the Court has, is that the process of
14 defense counsel objecting at the deposition disrupts the
15 deposition and forces Plaintiff's counsel to kind of identify
16 the theory of the case that we're pursuing. And in front of
17 the witness or in front of counsel, we think it's disruptive
18 and sort of shifts the burden to Plaintiffs in the manner of
19 conducting depositions and also is inefficient in that, if we
20 have a discovery dispute in the future, when we have to bring
21 everything to the Court during the deposition, those
22 depositions are time-consuming and expensive, and we think
23 there needs to be a different mechanism for addressing it
24 during the deposition.

25 So we wanted to raise those issues for the Court.

1 I'm happy to answer any specific questions that the Court has
2 about the substance of any of the disputed requests.

3 THE COURT: Well, I think that there's no time like
4 the present. Let's go first to the requests for production.
5 Tell me what it is that you want. Ms. Idalski can tell me
6 why she won't produce it, and I'll rule.

7 MS. IDALSKI: Your Honor, this is Annette Idalski.
8 Real quick, too, before we get into it, there are -- there
9 were 11 initial requests. There were 51 requests served
10 after that. So 51 from 34. So if we are still at 45
11 requests, even if we knock out nine or allow them to get
12 responses on these nine, we're still ten or 11 requests over.
13 So we still have a lot to break through. I just want to
14 state that before we get into the matter.

15 THE COURT: Okay. Miss Schalman-Bergen, start with
16 the requests, and tell me what it is that you want.

17 MS. SCHALMAN-BERGEN: I believe the first disputed
18 request is No. 41. And what that seeks is documents that the
19 individual or individuals who made the determination about
20 classifying the Pennsylvania class members as exempt reviewed
21 or relied upon.

22 So we believe that in 2014 Gulf Interstate
23 underwent a process by which it examined and determined that
24 all pipeline inspectors were exempt from the overtime
25 requirements, regardless of their geographic location,

1 specific project or client.

2 And the documents that Gulf relied on for that
3 classification we believe are relevant to commonality,
4 predominance, superiority, because Gulf made the decision
5 that the inspectors met one or both prongs of the applicable
6 exemptions on a classwide basis.

7 So while we disagree with their ultimate
8 assessments that the class members are exempt, the process
9 that they got there is helpful and we believe will tend to
10 demonstrate that there are essential issues that are common
11 to the class.

12 Our rationale I think for this is similar to some
13 of the other requests that we sought, but we can address
14 those each in turn.

15 THE COURT: Okay. Ms. Idalski?

16 MS. IDALSKI: Yes, Your Honor. Number one, counsel
17 did not ask the 30(b)(6) witness any questions with respect
18 to pay or exemptions or policy, and they had access to
19 Mr. Sprick but did not ask him any of these questions.
20 That's number one.

21 Number two, all of the nine, including No. 41,
22 you'll see there's a common theme as to who did you talk to
23 to come up with your, you know, classification of exempt?
24 Which documents did you rely on? What investigation did you
25 do? Did you have a Department of Labor complaint? Did you

1 have any prior lawsuits?

2 All of these things relate to willfulness and
3 whether or not the company willfully knew all along
4 supposedly or allegedly that they should have been paying
5 hourly and instead paid based on the exemption status.

6 So these all go to -- and they're very standard and
7 merit-based discovery. They all go to the willfulness and
8 the liquidated damages prong. So whether or not Gulf
9 Interstate -- number one, we contend and will be able to show
10 that these inspectors were always paid exempt. Nothing was
11 changed.

12 They clarified their pay letter because, you know,
13 obviously these Plaintiffs' attorneys were misconstruing it.
14 But -- and that's it. So this line of questioning regarding,
15 you know, when we met with, you know, Rich Burch initially,
16 and he came over to your office to talk about settlement, did
17 you change your policy, and what did you rely on, all of that
18 relates to this willfulness argument.

19 So I don't understand from counsel how this could
20 possibly relate to commonality and typicality under Rule 23
21 or similarly situated under 216(d).

22 THE COURT: Ms. Schalman-Bergen?

23 MS. SCHALMAN-BERGEN: Your Honor, while certainly
24 it touches on willfulness, it's also relevant to the process
25 by which they claim to classify all class members as exempt.

1 Gulf Interstate seems to believe that they could
2 make a blanket classification of all class members of all
3 pipeline inspectors; and so to the extent they're going to
4 argue that individualized issues predominate with respect to
5 the ultimate question, I believe that we're entitled to
6 documents that show how they themselves determined that there
7 wasn't any individualized issues with respect to how they
8 classified the pipeline inspectors as exempt.

9 Now, if defense counsel -- I mean one way that we
10 could deal with this is if defense counsel wants to stipulate
11 that certain things are not relevant -- I just want to make
12 sure that we're able to present to the Court sufficient
13 information to satisfy the Third Circuit Court's requirements
14 that we identify common issues and that, as Your Honor knows,
15 the Third Circuit has said that there is a merits-based
16 inquiry to all of this.

17 So we just want to make sure that we have the
18 information we need to be able to satisfy our burdens under
19 the applicable case law.

20 THE COURT: Okay. Anything further, Ms. Idalski?

21 MS. IDALSKI: Only that I don't -- I still don't
22 understand where Plaintiff's counsel is coming from on this
23 as it relates specifically to what did you do in the past to
24 come up with your pay plan? And frankly what is -- the
25 question what is your pay plan has not been asked to any of

1 our witnesses in any of these Interrogatories or requests.
2 So we're jumping ahead to what did you do to come up with the
3 pay plan when we hadn't even been asked the question what is
4 the pay plan?

5 THE COURT: Well, I have read all of Mr. Sprick. I
6 understood this was Volume I. I understood Mr. Sprick was
7 going to have another session. Has that been scheduled?

8 MS. IDALSKI: That was not our understanding, Your
9 Honor. He wasn't asked any questions about pay whatsoever.
10 And the counsel ended the deposition -- granted, it was
11 getting toward the holiday weekend, but still, I think we
12 ended the deposition with the holiday. It was Friday. Good
13 Friday. We still ended the deposition early.

14 And again, they've had Mr. Sprick since -- this is
15 the second time they've had him. If they want to ask him
16 questions about what is the pay policy, I think that that's
17 absolutely fair game.

18 But, you know, who did you talk to in coming up
19 with the policy? Did you rely on a regulation? Did you talk
20 to counsel in coming up with a policy? All that goes to good
21 faith and the willfulness argument and has nothing to do with
22 precertification discovery.

23 THE COURT: I'm looking at page 88 of the
24 transcript, and Miss Schalman-Bergen says, "Okay, Mr. Sprick.
25 Thank you for your testimony today. I'm going to hold open

1 the deposition because there are a tremendous number of
2 questions which Ms. Idalski would not permit you to respond
3 to. So we believe they are all responsive to certification
4 issues. But we don't need to fight about them right now, so
5 we'll reserve the right to call you back in when these issues
6 can be resolved, and I wish you a very happy Easter weekend."

7 So as I read it, this deposition is still open,
8 number one.

9 Number two, relative to documents reviewed and/or
10 relied upon, that's what the request is. What, Ms.
11 Schalman-Bergen, do you expect to find in terms of these
12 documents that may have been reviewed?

13 MS. SCHALMAN-BERGEN: Your Honor, we would expect
14 that the documents reviewed will identify that Gulf
15 Interstate made its decision about the exemption status both
16 on the salary basis prong and on the duties prong with
17 respect to all inspectors and that it was able to make that
18 determination without individualized inquiries into each and
19 every inspector, or maybe they reviewed a survey of duties.

20 I quite frankly am not sure what process they
21 undertook. We weren't permitted to ask about that at the
22 deposition.

23 We did have a deposition of Ms. Kramer earlier in
24 the day in which we talked extensively about their pay
25 practices. But with respect to the documents that they

1 reviewed, I would expect that the process that they underwent
2 will show that the exemption question can be resolved on a
3 common basis and will identify common questions that can be
4 certified pursuant to Rule 23, as the Supreme Court has
5 recently ruled in the Tyson case.

6 MS. IDALSKI: Your Honor, therein lies the problem.
7 They're missing the point that they have to show that
8 decision was wrong. Of course, the company believes that
9 these inspectors are all exempt, and they all have guaranteed
10 pay, and they all perform exempt duties. There's nothing
11 wrong with that. That's perfectly legal. That does not
12 certify a class, particularly when it's legal. I don't
13 understand that at all.

14 MS. SCHALMAN-BERGEN: Your Honor, each of these
15 deps -- this is Miss Schalman-Bergen again -- I would say are
16 bricks in the discovery process. And so I think part of the
17 problem here is that defense counsel has specific questions
18 that they want us to be asking about, but we should be
19 permitted to take the discovery that we need in the method
20 that we need in a manner that's efficient and proportional
21 certainly.

22 But the process by which Gulf Interstate classified
23 them, by which they made pay policy changes, so if after the
24 meeting with Mr. Burch, Gulf Interstate reviewed their pay
25 policies and sent out a letter to all inspectors doing what

1 it believed is clarifying the pay policy, we have a different
2 take on that.

3 We believe that they were attempting to change the
4 pay policy, and we contest that it was done properly. We
5 still contend that they violate the law.

6 But for class certification purposes, what we're
7 trying to establish is that there are common questions that
8 predominated over the litigation and can be tried on a common
9 basis. And so to the extent Gulf Interstate believes that
10 there were common issues between these inspectors such that
11 they could classify them all as exempt, make clarifications
12 in their words or tweaks to their pay policy and send out
13 supplemental letters to all inspectors, we believe that that
14 goes towards demonstrating that this can be done and can be
15 tried on a class basis.

16 MS. IDALSKI: And Your Honor, this is Annette
17 Idalski. Two things. Number one, that is incorrect. Even
18 if Gulf Interstate changed its policy, that would be called
19 mitigation of damages. And in a lot of these cases -- and
20 that didn't happen in this case. But I've had other cases
21 where we believed our workers were exempt; and for purposes
22 of the litigation, because we wanted to mitigate damages, we
23 changed the pay plan. And that is never used against the
24 company. So number one, that wouldn't even be admissible
25 evidence.

1 And number two, here's what I would suggest. If
2 Plaintiff wants to know all about Defendant's policies, its
3 exempt policies, when it started and how it came about, ask
4 Mr. Sprick. He's there. He's available for questioning. He
5 wasn't asked a single question on who came up with the pay
6 policy? How did it start? You know, what did you base it
7 on? And I think that's a more appropriate way, if that's
8 what Plaintiff's counsel wants to know.

9 THE COURT: Anything else? Go ahead.

10 MS. SCHALMAN-BERGEN: Your Honor, I would just
11 say -- this is Miss Schalman-Bergen. There are many avenues
12 of discovery that we can pursue. You know, Miss Idalski
13 identified certain topics that were blocked off as not
14 relevant to Rule 23 precertification; but we also need the
15 documents that were requested to ask the witnesses,
16 Mr. Sprick or any other, about them.

17 So I don't believe that our discovery should be
18 limited simply to the deposition testimony when we need these
19 documents in order to discuss those decisions with the
20 witnesses. That's all I would say.

21 THE COURT: Okay. Now, first off,
22 Miss Schalman-Bergen, as you know, the rules changed in
23 December. And everything is supposed to be proportional.
24 And I understand there's some District Judges in New Jersey
25 and also in Delaware that have put frowns on the language

1 "any and all documents." And every one of your requests is
2 that broad.

3 Secondly, to the extent that Mr. Sprick is relying
4 on any documents for his deposition, were those documents all
5 produced at his deposition, Ms. Idalski?

6 MS. IDALSKI: No. None were requested.

7 THE COURT: Oh, none were requested? So there was
8 no request to produce with Mr. Sprick's deposition notice?

9 MS. IDALSKI: No, Your Honor. This is Annette.

10 THE COURT: Well, that would have been helpful.
11 Secondly, relative to these requests for production, and for
12 example, I'm looking at 41. There is reference to the
13 persons identified in Interrogatory No. 13, but neither of
14 you have saw fit to give me Interrogatory No. 13 and the
15 Answers. And to prepare for today's proceeding, I've had to
16 go back to the well repeatedly asking you two for documents.

17 And you know, if you want me to referee your
18 discovery disputes, from here on out you're going to give me
19 an agenda, and you're going to give me all the attachments
20 that I need.

21 Relative to this discovery, I overruled the
22 objection, and Ms. Idalski, you're going to produce whatever
23 you think is responsive to 41.

24 And if you have a problem with something, then
25 you're going to give Miss Schalman-Bergen a detailed

1 privilege log. Whether it's attorney-client privileged or
2 what have you, you're going to do that.

3 Okay. Let's move on. No. 42.

4 MS. SCHALMAN-BERGEN: I think it's 44?

5 THE COURT: Well, okay. Let's move on to 44.
6 Disputed. As discussed in Section 1D, 1C, request for
7 production, all contracts or scope of work documents you
8 entered into with any outside consultant that relates to the
9 classification of Pennsylvania class members as exempt or
10 nonexempt, including documents related to considerations in
11 changing the classification of these positions.

12 Now, if what Ms. Idalski has to say is true,
13 there's been no change; right, Ms. Idalski?

14 MS. IDALSKI: Correct.

15 THE COURT: So why isn't the answer there are no
16 documents? Why aren't we just saying that?

17 MS. IDALSKI: Well, we very well may, Your Honor.

18 THE COURT: Well, you will either say yes or no to
19 that question. And if it's no, you're going to say that.
20 And you're going to sign your name as the counsel.

21 Okay. Let's move on to 45. As clarified and
22 combined with request Nos. 46 and 47, all plan documents for
23 GIFS 401(k) plans during the relevant time period and all
24 documents or correspondences, including E-mails generated, in
25 connection with GIFS's annual testing of eligibility or

1 nondiscrimination for its 401(k) retirement plans.

2 Now, Mr. Sprick was examined a little bit about
3 401(k). What else do you need to know, Miss Schalman-Bergen,
4 about the 401(k)s?

5 MS. SCHALMAN-BERGEN: Your Honor, here in this case
6 there's an issue that Gulf Interstate has not kept accurate
7 records of the hours that inspectors worked. We believe that
8 in opposition to class certification, Gulf Interstate may
9 challenge that there are individual issues that predominate
10 with respect to the number of hours that inspectors worked.

11 The IRS implemented rules to permit
12 nondiscrimination testing and eligibility of the 401(k)
13 plans, and part of that requires the employers to undergo
14 annual testing by a method specified in the plan document,
15 and as part of this testing the companies are required to
16 count the number of hours that each of its employees work.

17 The way that Gulf Interstate counted the hours that
18 pipeline inspectors worked in a year for purposes of the IRS
19 we believe is relevant to establishing the reasonable
20 inference of the number of hours that the inspectors worked
21 pursuant to the Anderson v. Mt. Clemens decision, the Tyson
22 decision that the Supreme Court recently discussed.

23 At the deposition when I tried to ask these
24 questions, Ms. Idalski instructed the witness not to answer.
25 We tried to meet and confer on the issue. It's sort of

1 difficult to assert your mental impressions about the
2 relevance of something at the time. I tried to do my best.
3 But we do believe that these documents are relevant and that
4 they will help to show the hours worked by the employees,
5 that that can be resolved on a common basis.

6 THE COURT: Okay. Ms. Idalski, do you have
7 anything further to say on this point? I read --

8 MS. IDALSKI: Yes.

9 THE COURT: I read all of your objections at page
10 66, 67 and the like. By the way, I think I mentioned to all
11 of you, this Court is guided by Judge Gawthrop. And when
12 you're in a Federal deposition setting, you're not supposed
13 to be making lots of speaking objections. Your witness
14 should be prepared ready to go.

15 MS. IDALSKI: Your Honor, if I may, on this issue,
16 this is not relevant to precertification issues, and it's not
17 relevant to anything. And I was trying to understand where
18 Miss Schalman-Bergen was coming from, not having the code in
19 front of me. This was not -- is something that was listed on
20 the Exhibit A as to an area that we would be discussing. And
21 there was nothing about ERISA.

22 We were not prepared to discuss it; and then going
23 back and doing research with my team, it quite frankly took
24 us a while to figure out where this was coming from. We
25 still don't understand it, but I'll make it simple, that

1 hours of service with respect to ERISA and the FLSA are
2 completely different.

3 If you look under ERISA, hours of service are used
4 to do nondiscrimination testing and for plan eligibility
5 requirements, but they're different because hours of service
6 under ERISA are different than hours worked under the FLSA.

7 So like for example, under ERISA when you're
8 looking at calculating hours of service, you would calculate
9 vacation, you know, time off, all of that, holiday, illness,
10 layoff, jury duty, military duty, leaves of absence. This is
11 29 CFR 2530.200b-2(a)(2). Under the FLSA you look at hours
12 actually worked. So you would not be including any time off.

13 So this would not be relevant to anything, not
14 precertification issues or any other individualized issues
15 that ends up being an area that we use as a defense later.

16 THE COURT: Okay. Ms. Schalman-Bergen, anything
17 else on this one?

18 MS. SCHALMAN-BERGEN: No. I would just say --
19 well, I certainly acknowledge that the legal standards may be
20 different. I want to make sure that we can address any
21 concerns that Gulf Interstate raises about individualized
22 issues with respect to the number of hours, notwithstanding
23 that they didn't properly track the hours worked.

24 So while -- you know, I can't tell you at this
25 moment, without seeing what the documents say and seeing the

1 method by which they did that, you know, exactly whether it
2 will track one for one, but I would say that they have an
3 obligation under the IRS testing rules to count the number of
4 hours, and we're interested in the method by which they did
5 that and whether it was common for all pipeline inspectors.

6 THE COURT: Didn't you have a chance to ask those
7 kind of questions to Sprick and to Kramer?

8 MS. SCHALMAN-BERGEN: Your Honor, I attempted to
9 ask a number of questions of Mr. Sprick, and they were each
10 met with a refusal to answer. So I --

11 THE COURT: Well, I read -- excuse me. I read this
12 entire transcript this morning. And there were a number of
13 objections. They came more late than they came early.

14 Also, you had a prior transcript. I don't have the
15 benefit of that. These people have been deposed before. You
16 have the benefit of all of that.

17 And to that end, at this time I am not going to
18 require Gulf Interstate to provide you with all this 401(k)
19 information. You're going to have to make a better showing
20 why you need it.

21 And to that end, Sprick and Kramer, to the extent
22 she hasn't been asked, they need to be asked these questions
23 about how these pays were actually computed, how the records
24 were kept and the like. And if it means you have to depose
25 all these other people that Sprick listed, then so be it.

1 So then we're going to move on to 47 is withdrawn.
2 So that's part of this 401(k). As I said, you're not -- Gulf
3 Interstate is not going to produce those at this time.

4 The next couple are withdrawn. On 50 we still have
5 a dispute. All documents constituting or concerning any
6 studies, reports, analyses, surveys, questionnaires or
7 statements conducted or obtained by GIFS that evaluate,
8 assess or make recommendations about the payment of overtime
9 compensation to class members, including, without limitation,
10 GIFS's investigation of the allegations asserted in this
11 case.

12 Well, as I read that, that does not seem to relate
13 to precertification. It seems to me there's a lot of work
14 product and attorney-client privilege in there.

15 Ms. Schalman-Bergen, are you going to try to
16 persuade me otherwise?

17 MS. SCHALMAN-BERGEN: Your Honor, I would simply
18 say that, you know, with respect to these issues, what we're
19 trying to do is ensure that we have the discovery necessary
20 to defend any challenges at certification, and as you're
21 aware, there have been rulings that merit is relevant at that
22 stage. And so that's what we're seeking to address.

23 We also have an unjust enrichment claim that I
24 think is relevant to this specific request, demonstrating the
25 scheme that we believe that Gulf Interstate has done here.

1 THE COURT: What scheme is that?

2 MS. SCHALMAN-BERGEN: The scheme of misclassifying
3 its employees to deny them overtime under the law.

4 THE COURT: Oh, okay. All right. Ms. Idalski,
5 what do you say about request 50?

6 MS. IDALSKI: Your Honor, I agree. I mean all of
7 this goes to -- I mean reports, analyses, all of this is
8 going to be privileged if it even exists. I don't know if it
9 exists.

10 THE COURT: Well, you told me earlier that there's
11 been no changes, number one. If that's the case, that's what
12 you're going to say.

13 Number two, I'm surprised at this stage you don't
14 know if it does or doesn't exist. You have this, and you've
15 had it. You have a team. You should have at least asked
16 your client.

17 At this point my ruling is that request No. 50 is
18 not going to be answered because it appears to me that this
19 is largely work product, attorney-client privilege and the
20 like.

21 And to the extent that there hasn't been any
22 change -- let's just put it on the table. There hasn't been
23 any change, and stop playing the games.

24 Request for 51 has been narrowed. Is there still
25 dispute?

1 MS. SCHALMAN-BERGEN: No, Your Honor.

2 THE COURT: Okay. So we don't need to deal with
3 that? 52 there doesn't seem to be any issue. 53, 54 is more
4 disputes. All documents constituting or concerning any
5 inquiries, investigations, complaints, administrative
6 charges, lawsuits or claims of any kind by or from any
7 persons, blah, blah, blah, in the past ten years regarding
8 the alleged failure of GIFS to maintain accurate time
9 records, to pay employees for all hours worked and to pay
10 overtime compensation under any State or Federal law.

11 And Defendant says that this is not related to
12 precertification issues. Well, it could be. Has anybody
13 done a docket search on GIFS? Has anybody done an FOIA
14 request on Gulf Interstate?

15 MS. SCHALMAN-BERGEN: We've done a docket search,
16 but I don't believe we sent a FOIA request.

17 THE COURT: Well, a FOIA request is a cheap way to
18 do investigation and discovery. It's a lot less expensive
19 than attorneys dickering over requests.

20 So I think, Miss Schalman-Bergen, the first thing
21 you're going to do is an FOIA request. It should have been
22 done a long time ago in preparation for this lawsuit.

23 Now, to that end, Ms. Idalski might want to check
24 with her client first. You know, it's always helpful,
25 Ms. Idalski, if there's bad news out there, that you be the

1 bearer of the bad news rather than have your opposition
2 spring the bad news on you. So if there are such
3 investigations by any entity against your client, your client
4 and you should probably know that first.

5 But in the meantime, Ms. Schalman-Bergen is going
6 to do a FOIA request. That's how we're going to handle that.

7 Then we're going to move on to request for
8 production 57. Section 1(b)(1)(C) again. All communications
9 between GIFS and its attorneys relating to any requests for
10 advice and/or provision of advice regarding the legality of
11 its compensation paid to Pennsylvania class members. If you
12 deem any such communication as privileged, provide a
13 privileged log that complies with the Federal Rules of Civil
14 Procedure.

15 And it seems to me that this is way beyond what
16 should be the scope of proper discovery here.
17 Miss Schalman-Bergen, tell me why it is not.

18 MS. SCHALMAN-BERGEN: Your Honor, in defense to
19 this action, Gulf Interstate has raised affirmative defenses
20 relating to its classification decision. And at certain
21 times defense -- as part of that defense the Defendant will
22 choose to waive the privilege if they're asserting an advice
23 of counsel defense.

24 To the extent that they're not waiving that
25 privilege, then we agree they need not produce that, but if

1 they are intending to assert that affirmative defense, we
2 believe that we are entitled to discovery on it and at the
3 Rule 23 stage to demonstrate that such affirmative defenses
4 can be resolved on a classwide basis.

5 THE COURT: All right. Ms. Idalski, are you
6 asserting attorney advice?

7 MS. IDALSKI: Your Honor, at this stage if we
8 were -- and I don't believe we have -- I'd have to go back
9 and look. But that has to do with whether or not our client
10 was willful and whether or not at some point -- now, remember
11 there was the Ohio litigation. So whatever advice they would
12 have gotten there, you know, I'm not sure of.

13 And again, all that goes to willfulness. I don't
14 see how it relates to precertification discovery whatsoever.
15 So I don't feel that we should have to respond to this at
16 this particular -- particularly at this stage.

17 Now, if there is a -- it's too broad; and if at
18 some point we are going to raise this defense, then you know,
19 we will make that clear. And of course, we're going to waive
20 the privilege and provide whatever we have in order to
21 support our defense. But at the precertification stage, this
22 is not relevant.

23 MS. SCHALMAN-BERGEN: Your Honor, this is
24 Miss Schalman-Bergen again. I mean in order to deal with
25 this, I would ask that defense counsel stipulate that they're

1 not going to raise an advice of counsel defense in any way
2 to -- as an opposition to class certification.

3 THE COURT: Ms. Idalski, your response?

4 MS. IDALSKI: Okay. Well, that's narrower than
5 what's been requested. And no, we're not.

6 THE COURT: So no, you're not going to so
7 stipulate?

8 MS. IDALSKI: That's correct. No. I will
9 stipulate we are not doing it at the precertification stage.

10 THE COURT: So let's get it clear. The Defendant
11 is saying at precertification they are not going to rely on
12 advice of counsel. Correct, Ms. Idalski?

13 MS. IDALSKI: That's correct, Your Honor.

14 THE COURT: Okay. All right. So that seems to
15 moot this request for production. Later on it might become
16 pertinent.

17 Next, request for production No. 59, this is also
18 disputed. All documents sufficient to identify GIFS's
19 monthly and yearly labor costs for Pennsylvania class members
20 during the relevant time period.

21 So what are you looking for? Gross numbers, Miss
22 Schalman-Bergen?

23 MS. SCHALMAN-BERGEN: Yes, Your Honor. As part of
24 our unjust enrichment claim, we've alleged that by
25 securing -- by securing the work and efforts of Plaintiff in

1 the Pennsylvania class without paying them overtime, they
2 enjoyed reduced overhead with respect to their labor costs
3 and realized additional earnings and profits to their benefit
4 and to the detriment of Plaintiff.

5 So this request goes squarely to our unjust
6 enrichment claim, and we believe that that information is
7 necessary to demonstrating that the unjust enrichment claim
8 can be brought on a classwide basis.

9 THE COURT: Okay. Ms. Idalski, your response?

10 MS. IDALSKI: Your Honor, how is this related to
11 216(b)? I just don't see how it's relevant. So they're
12 going to take our monthly and yearly labor costs and allege
13 that -- what? It doesn't match what every -- they're not
14 going to have the total sum of all of our employees and all
15 of our contracts nationwide. So I don't know how they would
16 ever use this information.

17 I mean I think it's overly broad. If they want to
18 restrict it to Kinder Morgan, which is really the only
19 project at issue as far as we're concerned, again I think
20 it's irrelevant, but we could limit it to that.

21 THE COURT: So to start, you're going to limit it
22 to Kinder Morgan?

23 MS. SCHALMAN-BERGEN: Your Honor, if I may, the
24 Pennsylvania class that we're seeking to certify is for all
25 employees who work in Pennsylvania, and that's not just the

1 Kinder Morgan project. So the discovery that we're seeking
2 is for all inspectors who work in Pennsylvania, and defense
3 counsel has identified approximately 158 who worked on
4 various projects. But the class that we certify is not
5 simply for the one project or the one client.

6 THE COURT: Ms. Idalski?

7 MS. IDALSKI: Right, Your Honor, but a class hasn't
8 been certified yet. This is really going beyond the scope of
9 proving certification.

10 I mean clearly if they're going to get a -- they're
11 going to get this class certified based on 216(b) and Rule
12 23, this seems to be a merit-based argument to me, not a
13 precertification argument. This is, again, she's talking
14 about unjustly enriched from a merit standpoint, substantive
15 standpoint. I think it's premature.

16 THE COURT: Miss Schalman-Bergen, how does this tie
17 in to your class allegations outside of the fact that you've
18 titled your Count 3 alleged unjust enrichment on behalf of
19 the Pennsylvania class?

20 MS. SCHALMAN-BERGEN: Your Honor, Ms. Idalski is
21 not wrong. That part of it does go to merit, and I wish that
22 the case law hadn't gone the way it was. But the Third
23 Circuit has required a look into the merits when deciding
24 class certification.

25 So showing the labor costs and showing that they

1 could be reduced, we're trying to get information to that so
2 we can meet the burden and satisfy the existing case law.

3 THE COURT: Okay. And as I said, and I'll say it
4 again, you're going to start with Kinder Morgan, and after
5 you get those documents, if you think there's more that you
6 need, then you're going to tell me. But Ms. Idalski's going
7 to first produce whatever she has as it relates to Kinder
8 Morgan.

9 MS. SCHALMAN-BERGEN: Your Honor, may I ask a
10 clarifying question? Is that specific to this request?

11 THE COURT: Yes.

12 MS. SCHALMAN-BERGEN: Okay. Thank you.

13 THE COURT: Okay. That's what she offered. That's
14 what she's going to produce. You're going to look at it.
15 Then you can come back to me, and you can tell me, Judge,
16 there's 16 other job sites for these 158 folks in PA. And
17 based on what I see in Kinder Morgan, this is how it does or
18 doesn't work for me to get a class. And this is how it does
19 or doesn't pertain to the merits, and this is how I am or am
20 not going to comply with the Third Circuit.

21 So that's how we're going to start. Because again,
22 a lot of these document requests are too broadly worded under
23 the current rules.

24 Okay. So that was request 59. 60 is withdrawn.
25 61 is withdrawn. And 62, any documents identified, referred

1 to or used in preparing the accompanying second set of
2 Interrogatories. That doesn't make sense. It would seem to
3 me Answers to Second Interrogatories. But to that end, to
4 the extent you're producing documents here and they relate to
5 the Interrogatory Answer, then you're going to have to
6 supplement.

7 So that should take care of these requests for
8 production. Relative to depositions, if you two cannot agree
9 on what is or what is not a fair question under Judge
10 Gawthrop's decision, then and in that event I'm going to have
11 to hire somebody who can referee all of your depositions.

12 And that person will have to be skilled in these
13 class action cases, and he or she will get paid by the hour
14 to say what is or isn't a proper question.

15 Or you can take these depositions like you took
16 Sprick's. You can leave them open. You can file a motion.
17 And you can give me a brief, and I'll read the transcript
18 like I read this one all this morning. And then I'll make a
19 ruling in writing or on the phone and tell you what you can
20 or can't continue to ask, for example, Mr. Sprick. So you
21 all tell me how you want to proceed.

22 MS. IDALSKI: Your Honor, I think -- this is
23 Ms. Idalski. I think we'll try to work this out. There have
24 been a lot of speaking objections, and that's what got us
25 into trouble in the Sloane deposition. In a 30(b)(6) I do

1 try to always work it out on the record with counsel just so
2 we can have a record and try to get through it. I didn't
3 realize that was not what Miss Schalman-Bergen wanted to do.

4 I mean we can always go off the record and
5 conference right then and there. I think it makes sense. I
6 mean I'm just trying to understand how it relates to 30(b)(6)
7 and the category. But if that's not how she wants to do it,
8 then I guess we can go the other way that you're suggesting.

9 THE COURT: Okay. Miss Schalman-Bergen, how are we
10 going to do this 30(b)(6) or these other depositions without
11 a plethora of objections?

12 MS. SCHALMAN-BERGEN: Your Honor, I will be honest.
13 I am concerned about the depositions proceeding and
14 continuing to be disrupted by objections and instructions not
15 to answer based on whether the issue is relevant to class
16 certification. And I just -- I hate to have to stop the
17 deposition to contact Your Honor or to even leave it open.
18 You know, people spend a lot of time on travel and money, and
19 I just -- I'm worried about the efficiency of doing all of
20 that.

21 Certainly we'll try to work together to reach
22 agreement on it; but after this first deposition, I'm just
23 concerned that the lines of merits versus class are very hard
24 to walk, and that if we have to justify each and every
25 question as being specifically related to class cert., it

1 makes it very difficult for us to conduct a deposition.

2 THE COURT: Okay. Any other suggestions anybody
3 has?

4 MS. IDALSKI: Your Honor, it would help, Your
5 Honor, if the category could be a little bit more specific.
6 401(k) is a good example so that we could take care of
7 objections prior to the deposition and get those all resolved
8 before we go back with Mr. Sprick. That's one idea.

9 THE COURT: Well, Ms. Schalman-Bergen, I'm looking
10 at your Schedule A for Mr. Sprick, the 30(b)(6). And again,
11 it's pretty broad.

12 And so first, you want to know the investigation of
13 all the allegations asserted in the case. So that to me is
14 potentially work product, attorney-client privileged, and all
15 kinds of other potential objections.

16 Then you want the corporate hierarchy. As I read
17 Sprick's deposition, you practically named everybody and
18 anybody who ever worked at that company. Then you want the
19 job titles, job descriptions, job duties and responsibilities
20 of Plaintiff and the class members and any changes in these
21 job duties and responsibilities during the relevant time
22 periods. Again, pretty broad.

23 But it seems to me that Mr. Sloane's been deposed.
24 He should have been asked about whatever his jobs were when;
25 and if any of these job classifications are in writing, let's

1 just produce the job descriptions and be done with it.

2 Then the manner of compensating Plaintiff, I
3 understood Ms. Kramer at least was asked about those
4 questions. All policies and practices applicable to
5 Plaintiff and class members, I would suggest that those are
6 producible, Ms. Idalski, if they're in writing.

7 Back to No. 6, we're talking about investigations,
8 discussions, studies and audits. Again, a FOIA request
9 and/or a docket search might have been helpful. But when you
10 get into attorney work product, you're going to have
11 problems.

12 Seven is the same. Legal opinions that were relied
13 on, again, that to me seems to be more in the way of a
14 willfulness inquiry.

15 Exemption, you're going to the defenses here. I
16 know you're going to tell me that you're trying to find out
17 what is or isn't common.

18 The factual basis for all affirmative defenses and
19 the like, a lot of this is getting broader and broader. And
20 I think that what you two both need to do is sit down and
21 negotiate this notice of deposition. And if you can't
22 negotiate it and make it more narrow under the current
23 Federal rules, then and in that event, as I said, I'll have
24 no problem appointing a Special Master that you two can pay
25 hourly to work out these discovery disputes because the Court

1 is not going to be burdened time and again.

2 Another option is I'm going to take the lid off of
3 this case, and there won't be bifurcated discovery, and we'll
4 do all issue discovery all at once, and maybe that's what
5 Plaintiff's ultimate end game is here anyway.

6 So I think you two need to sit down and talk
7 face-to-face and try to work these things out. Both of you
8 have done these type of cases before. Neither of you or your
9 clients are babes in the woods. And so this needs to be
10 worked out rather than take a lot of time from the Court,
11 especially a Court that's currently down three sitting
12 District Judges and soon to be down a fourth.

13 MS. IDALSKI: Yes, Your Honor.

14 THE COURT: So when can you two meet and make up a
15 second amended notice of deposition that I can take a look
16 at?

17 MS. IDALSKI: Your Honor, do you want us to meet in
18 person?

19 THE COURT: It seems to me that might be the best
20 beneficial because I would doubt that E-mails between you are
21 advancing the ball.

22 MS. IDALSKI: Yeah. We've had some extended
23 telephone conversations, but yeah, we could definitely do
24 that within -- I mean I could within the next week or week
25 after.

1 THE COURT: All right. And Miss Schalmán-Bergen,
2 how about you? What's your availability?

3 MS. SCHALMAN-BERGEN: Your Honor, I'm in Pittsburgh
4 on the 15th for another approval hearing. I don't know if
5 that is a workable location for an in-person meet and confer,
6 but I could do -- we have our final approval hearing at 12:30
7 on Friday the 15th, and I have to take the later flight back.

8 THE COURT: Ms. Idalski, can you get to Pittsburgh,
9 or can you delegate to Mr. Whitson?

10 MS. IDALSKI: I cannot do it, Your Honor, but I can
11 delegate to Mr. Whitson or Mr. Hall.

12 THE COURT: Okay. And to that end, why don't you
13 two parties through your respective counsel plan on getting
14 together on the 15th and plan to get me a second amended
15 notice of deposition no later than the 20th? Okay?

16 MS. IDALSKI: Yes, Your Honor.

17 MS. SCHALMAN-BERGEN: Yes, Your Honor.

18 THE COURT: Okay. Now, there was also all that
19 fussing about Mr. Sloane's deposition. Is his deposition
20 totally done?

21 MS. IDALSKI: Your Honor, we have two more hours
22 remaining on Mr. Sloane's deposition that we would like to
23 use as well. We haven't made that an issue because it's not
24 a priority right now. But we have -- most of what we need,
25 things went much smoother after we spoke to you.

1 THE COURT: And Mr. Sloane needs to know that he is
2 a litigant. He's not an advocate. He needs to just answer
3 the questions.

4 MS. SCHALMAN-BERGEN: Your Honor, this is
5 Miss Schalman-Bergen, if I may. Mr. Sloane sat through an
6 entire day of deposition and went through his entire criminal
7 history and answered incredibly personal questions about
8 himself and his background, and it was incredibly challenging
9 for him.

10 And through that he answered the questions, and I
11 don't believe that he was refusing to respond to questions.
12 We objected to the deposition staying open. We were
13 available to continue questions. He was responsive to all
14 the questions. He was available for the full time. And he
15 was available for a day, and I believe the rules say one day
16 of seven hours, and he was available for that time.

17 And I would just respectfully request that he not
18 be required to come for another deposition. He had all of
19 the questions before him, and I think if you reviewed the
20 transcript, you would see that.

21 At the very beginning he gave a little bit of
22 push-back about answering personal questions about his son
23 and his fiancée and former marriage, which I think is
24 understandable under the circumstance. But he throughout the
25 day was responsive. I don't believe that he was acting as an

1 advocate, but was being forthcoming about his testimony.

2 THE COURT: Ms. Idalski, anything further on
3 Mr. Sloane?

4 MS. IDALSKI: Yes, Your Honor. I'm going to let
5 Mr. Hall respond to this because he was the one that -- I was
6 there, but he was taking the deposition.

7 THE COURT: All right.

8 MR. HALL: Very briefly, Your Honor, in the
9 transcript it will speak for itself, but in particular I did
10 ask Mr. Sloane the following question: I asked him if he
11 would agree to answer my question directly. And his response
12 was no. And the transcript will bear out that that's exactly
13 what he did.

14 Now, I understand that he may not have wanted to
15 answer a number of the questions, but given that he is
16 holding himself out as the representative of hundreds, if not
17 thousands, of other individuals in this litigation, his
18 adequacy as a representative is squarely at issue, and we're
19 entitled to a thorough and sifting cross-examination on those
20 topics.

21 Now, as to the full day, I would also note that we
22 did start an hour late because Ms. Schalman-Bergen and
23 Mr. Sloane were not available or not ready at the time.
24 Frankly, I think it was a miscommunication on the deposition
25 notice.

1 But we do have an hour and 50 minutes I think is
2 what was remaining on the transcript at the end of the day.
3 At this point we are not pushing for the immediate
4 reconvening of that deposition. We are simply saying that at
5 some point it may become necessary for us to take that
6 remaining time.

7 MS. SCHALMAN-BERGEN: Your Honor --

8 THE COURT: Miss Schalman-Bergen?

9 MS. SCHALMAN-BERGEN: Your Honor, I just have to
10 correct the record, that Mr. Sloane was not objecting to it.
11 Mr. Hall -- there was some moments where Mr. Hall's
12 questioning were argumentative, were harassing, and the
13 answer that Mr. Sloane was talking about was that he didn't
14 feel like the question that Mr. Hall was giving him was a yes
15 or no question, and he wanted to expand, and that was it.
16 And he was fully responsive all day long.

17 With respect to the timing, it was our apologies.
18 The deposition notice said 10 p.m. and it said Eastern. We
19 were in Texas, and I did not read the Eastern time, but it
20 was a misunderstanding, and we would have been available and
21 said that we were available to stay the remainder of the day
22 as late as possible. We were not going to end the
23 deposition.

24 THE COURT: Okay. Well, it sounds like he still
25 has another hour to go. And it sounds to me like I need to

1 read the transcript. So one of you can send me the
2 transcript. And I'll read it is.

3 MR. HALL: Yes, Your Honor.

4 THE COURT: Anything else that we need to discuss
5 here today?

6 MS. IDALSKI: The only other thing, Your Honor, is
7 that we did agree on a mediator. We're working on --

8 THE COURT: Yes. I saw you picked Sally Cimini, as
9 I understand it? Is that right? Or do I have a different
10 case in mind?

11 MS. IDALSKI: No. You're correct, Your Honor.

12 THE COURT: As everybody knows, she's a skilled
13 employment lawyer and neutral. She does a lot of cases. And
14 she says she's available in April or May. So at this point
15 in time who's been talking to her?

16 MR. HALL: I spoke with her -- this is Peter Hall.
17 I spoke with Miss Cimini initially, and we've now circulated
18 proposed dates, and we're simply working to identify a date
19 that works for all parties to meet with Miss Cimini up in her
20 offices in Pittsburgh.

21 THE COURT: And it works for everybody that we're
22 talking about either April or May? Is that right?

23 MR. HALL: Yes, Your Honor. We understood the
24 Court's local rule about 60 days after the entry of the case
25 management order. So we're trying to hit that deadline.

1 THE COURT: So Mr. Hall, what I need you to do,
2 since you finally picked somebody and you're looking at
3 dates, today is April 4. By April 11 you need to file a
4 notice with me telling me exactly when you're going to go see
5 Ms. Cimini, where you're going, if you're going to be at her
6 office or Schnader's office or the courthouse, who's all
7 going to be there.

8 And to that end, let me stress, Mr. Sloane
9 certainly should be there; and maybe somebody else, anybody
10 else who may have opted in, they might want to be there, too.
11 Lead trial counsel need to be there. Gulf Interstate needs
12 to have somebody with ultimate authority there, somebody who
13 can respond to whatever the demands are and the like.

14 Further, to the extent that any and all of you can
15 get agreements on things, you should try to get some
16 agreements on things, even if it's not to settle the case.

17 So for example, maybe you can't settle it, but you
18 can agree on some of the facts. That would at least be
19 helpful. That would advance the ball. So whoever is there
20 from Gulf Interstate needs to be knowledgeable about the
21 case, needs to have settlement authority, and also should be
22 in a position to say to Ms. Idalski or Mr. Hall, yep, we can
23 agree to that fact or we can agree to that number.

24 And the other thing that you should do, and I
25 strongly encourage this, although I think Ms. Cimini's letter

1 of engagement spells this out. You need to call her and have
2 an attorney-only conference call with her prior to the
3 mediation date. And at that time you can give her an
4 overview of the case, what, if anything, you've done and the
5 like so she has some sense of what's going on.

6 And I trust everybody's agreed this is a mediation
7 and not an Early Neutral Evaluation. Is that right?

8 MS. IDALSKI: Yes, Your Honor.

9 THE COURT: Because we've had a series of issues
10 here in this Court where one side or the other has not fully
11 engaged because they were looking for a mediation, and the
12 other side was looking for an ENE, or early in the process
13 the neutral put a number on the case and, in effect, that
14 caused one party or the other to disengage from the process.

15 So if you haven't done it, there's now about a
16 dozen cases that are written District Court opinions either
17 by Magistrate Judges or District Judges addressing bad faith
18 in the ADR process.

19 So you might want to take a look at those so that
20 you are in compliance and prepared and ready to go. And if
21 you don't have those citations handy, Mr. Catanese can send
22 you a list of these citations to read.

23 Okay. Anything else?

24 MS. IDALSKI: No, Your Honor. Thank you.

25 MS. SCHALMAN-BERGEN: Thank you, Your Honor.

1 THE COURT: Does anybody want a transcript?

2 MS. IDALSKI: Yes, Your Honor. This is Annette
3 Idalski.

4 THE COURT: So the Court will order preparation of
5 the transcript. Ms. Idalski and her client will pay.
6 Miss Schalman-Bergen, do you or don't you need it for your
7 clients?

8 MS. SCHALMAN-BERGEN: Yes, Your Honor. We'll
9 request one, and we can split the costs.

10 THE COURT: So the costs will be split. And is
11 there any need to have it expedited?

12 MS. SCHALMAN-BERGEN: Not from Plaintiff.

13 MS. IDALSKI: No, Your Honor.

14 THE COURT: So it will be produced in the normal
15 course. Okay. Thank you all. And we're going to conclude.
16 Have a good afternoon, everybody. Bye-bye.

17 MS. IDALSKI: Thank you, Your Honor.

18 MS. SCHALMAN-BERGEN: Thank you.

19 (Proceedings were concluded at 4:05 p.m.)

20 - - -

21 C E R T I F I C A T E

22 I, Deborah Rowe, certify that the foregoing is
23 a correct transcript from the record of proceedings in the
24 above-titled matter.

25 S/Deborah Rowe _____
Certified Realtime Reporter